

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Closed Captioning and Video)

Description of Video Programming)

MM Docket No. 95-176

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**FEDERAL COMMUNICATIONS COMMISSION
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**REPLY COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.
ON NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION AND SUMMARY

Rainbow Programming Holdings, Inc. ("Rainbow") has ownership interests in and manages numerous programming networks that offer diverse and innovative national, regional and local programming services. Rainbow, based on its extensive experience, submits these reply comments on the FCC's proposed regulations on closed captioning of video programming.^{1/}

Rainbow has pioneered the niche programming concept for cable television. Throughout its history, Rainbow has been an incubator of new programming network services for unique audience interests. Rainbow's existing programming networks offer sports, regional and local news, fine arts, independent film, classic film, music programming, local services and learning resources. These networks fill critical television programming niches that might otherwise go unserved. Rainbow also intends to continue to create new networks to serve new niche audiences.

^{1/} Notice of Proposed Rulemaking, MM Docket No. 95-176, (released January 17, 1997) ("NPRM").

The FCC's proposals may adversely affect the creation and viability of diverse programming services, and in particular niche cable programming services such as those created by Rainbow and other similarly-situated programmers. While Rainbow supports the Commission's efforts, the FCC should avoid implementing overbroad and inflexible closed captioning restrictions that may harm, not enhance, Congress' objectives of ensuring the "full accessibility" of video programming to the hearing impaired.

Rainbow fully supports the many commenters that have filed in this proceeding representing the broadcast and cable industries, sports organizations, and producers and distributors of video programming in urging the Commission to adopt implementation schedules and exemptions that take into account the technical, economic and practical realities associated with closed captioning. Many media interests have already set forth in detail the harmful effects on new and niche programming services, such as those Rainbow provides, if closed captioning is phased in too quickly.

As the comments filed to date make clear, and as Rainbow confirms in these comments, without certain exemptions from closed captioning requirements, or extended implementation timetables, programmers like Rainbow would be impeded in their ability to develop new, high quality programming services including regional news and sports. Rainbow would also be hampered in bringing to the American public the best of arts and film programming, like BRAVO and American Movie Classics, that rely on a great deal of "library" product. Neither Congress nor the Commission could intend such a result.

For these reasons, the FCC should provide a moratorium of at least five years for captioning of new cable networks and allow a 10-year phase in for new, non-exempt

programming on existing cable networks. While the FCC should not adopt any captioning requirements for library programming, it should adopt exemptions or special timetables for services such as regional and local sports and news, to assure the continued innovation of new niche programming services.

II. NEW CABLE NETWORKS -- PARTICULARLY LOCAL AND REGIONAL NEWS AND INFORMATION SERVICES -- WILL BE HARMED IF TOTAL CAPTIONING IS REQUIRED ON TOO RAPID A SCHEDULE

Congress in the 1996 Telecommunications Act wisely authorized the FCC to exempt certain "programs" or "classes of programs" or "services" for which requiring closed captioning would be "economically burdensome."^{2/} One of the clearest cases for exemption of a class of programs are start-up cable networks. The FCC should exempt all start-up networks from the closed-captioning requirements for at least five years from their launch.^{3/}

As NCTA and several cable network commenters note, and Rainbow confirms, the start-up costs for a new cable network are high.^{4/} The launch of new cable network services requires substantial investment in research, program acquisition, personnel,

^{2/} 47 U.S.C. § 613(d)(1).

^{3/}Comments of the National Cable Television Association ("NCTA") at 19.

^{4/}Id. ("Indeed, the start-up costs for launching a stand-alone cable network have been estimated at \$100 million."); Comments of A&E, The History Channel and Ovation ("A&E") at 14.

facilities, marketing and promotion.^{5/} The FCC itself has recognized that the cost of live captioning can range from \$120 to \$1200 per hour,^{6/} and prerecorded captioning from \$800 to \$2500 per hour.^{7/} Even at the low end of these projected rates, the cost of closed captioning would comprise a substantial portion of a newborn cable offering's start-up budget.

Several other commenters, including The Golf Channel, Outdoor Life Network and BET On Jazz, back NCTA's contention that a cable network is typically unable to achieve any significant distribution levels and subscriber base, or break even as against start-up costs, until at least five years after it is launched.^{8/} Based on Rainbow's experiences, it can often take in excess of five years for a cable programming network, however worthy its objective or valuable its service, to begin to break even.

FCC Chairman Reed Hundt, in his address to the NCTA Convention in New Orleans last week, specifically singled out and praised cable's commitment to providing local news

^{5/}NCTA at 19 ("And unfortunately a number of new cable networks either fold within the first 5 years of launch due to the competitive nature of the marketplace or never become possible"); A&E at 14-15 (citing examples of failed, new networks to include: The Language Channel, The Health Channel, Popcorn Channel, Women's Sports Network, and New Culture Network, among many others); Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, America's Health Network ("Outdoor Life") at 13.

^{6/}NPRM at ¶ 20; In the Matter of Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility, Report, 3 Comm. Reg. 1058 at ¶ 48 (1996) ("Report").

^{7/}NPRM at ¶ 18; Report at ¶ 47.

^{8/}Id.

channels.^{9/} Rainbow is the creator of **News 12 Long Island**, cable's first 24-hour regional news network in 1986. News 12 packages and delivers news programming focused on the unique needs and issues of the suburban region it serves. Since 1986, Rainbow has added regional news operations serving Fairfield County, Connecticut, and Westchester County, New York. Just last year, Rainbow launched News 12 New Jersey, New Jersey's only 24-hour local news channel.

Rainbow is also the creator of **Neighborhood News**. Neighborhood News, a hyper-local news service that combines video packages, animation, still-digital images, voice-overs, and music tracks into a multi-media presentation, provides coverage of individual communities on their own 24-hour news channels. Seven individual Neighborhood News currently exist, and an additional five are planned for this Spring.

News 12 and Neighborhood News services are typical of start-up cable networks. Not one of these services could expect to turn a profit in less than five years. Yet the public service offered by Rainbow's award-winning regional news services is unquestioned.

Rainbow's other niche program services are also at higher risk from the cost of captioning than broader-based program services. For instance, Rainbow offers **The Extra Help Channel**, which was launched less than two years ago on Cablevision's cable systems serving Long Island, Brooklyn, Bronx, Westchester, Connecticut and New Jersey. Extra Help, serves a community learning center for people of all ages and provides specific assistance to school age children through curriculum based programming. But given Extra

^{9/}Reed E. Hundt, "Broadcasting, Cable and the Franchise," NCTA Convention, New Orleans, Louisiana, March 18, 1997, at 6.

Help's current limited distribution and operating budget, any even modest captioning charge would be a very high proportion of the channel's total budget.

As NCTA correctly notes, the additional expenses associated with closed captioning could have a chilling effect on the creation and development of such innovative new cable network programming services.^{10/} In many instances, start-up networks that operate on limited budgets, such as Rainbow's Extra Help and regional and local news channels, simply may be incapable of tolerating additional expenses that closed captioning would dictate.

In the 1984 Cable Act, Congress clearly stated its aim that cable provide the "widest possible diversity of information sources and services to the public."^{11/} Congress could not have intended that this aim be substantially undercut by the closed captioning requirement in the 1996 Act. It would be totally antithetical to the strongly expressed intent of Congress that diverse services such as Rainbow's not be unduly hampered by the FCC.

Government regulation that impedes the delivery of high quality programming like Rainbow's is not in the public interest. What Rainbow and other similarly situated video programmers are seeking is a head-start for newly launched niche networks. The Commission should adopt the test suggested by NCTA that a new network should be exempt for at least five years from the date of its launch, and allowed afterwards to phase in the closed captioning of its programming over the same schedule the FCC adopts for established

^{10/}NCTA at 20.

^{11/}Communications Act, § 612(a), 47 U.S.C. § 532(a). See also § 601(4), 47 U.S.C. §521(4).

networks.^{12/} Failure to take into account the unique factors present in a start-up network would result in the frustration of innovative new programming services before they are launched.

The FCC should also attempt to develop a second threshold based on subscribers, or viewership, or actual revenues that a new network would need to meet before it was subjected to closed captioning requirements. Rainbow realizes that this not an easy task. A test based on the total number of subscribers to the service would be simplest. But if only a small minority of these subscribers view the channel, total subscriber count might be misleading. While ratings would appear to be a rational measure of a cable network's ability to support captioning, the problem is that a network must pay to subscribe to Nielsen ratings services in order for its program to be rated. This is also very costly for a start-up cable network, particularly a regional or local one.

While Rainbow supports a more generous timetable for all start-ups, Rainbow also supports the views of several commenters that there should be other special captioning guidelines for local or regional cable news channels. For all of its regional newscasts, Rainbow either has currently, or is willing to acquire, the technology to provide the electronic newsroom ("ENR") captioning mentioned by the FCC that transmits to the screen text from scripting computers that service the teleprompters used by Rainbow's news personnel.^{13/} Rainbow's more recently created regional news services have already

^{12/}See NCTA at 20 (adding that a start-up network should have a 10-year transition period for closed captioning new, non-exempt programming, which would commence from the time the network's start-up status ends under the rules).

^{13/}NPRM at ¶¶ 21, 121.

acquired this capacity. Its older News 12 Long Island service will be modernized to acquire this capacity within the next two years. As NCTA notes, use of such captioning techniques should be held to fully meet a cable news channel's captioning mandate under the 1996 Act.^{14/}

III. REQUIRING LIBRARY PROGRAMMING TO BE CAPTIONED WOULD SEVERELY DETER ITS USE

Rainbow applauds both Congress' and the Commission's statements that it would be "inappropriate to mandate captioning of all library programming."^{15/} Rainbow wishes to underscore the comments of NCTA and many others that such archived product will not see the light of day if the cost of closed captioning is imposed upon the current cost of film or video library acquisition.^{16/} This would deprive cable subscribers of many of the nation's classic films as well as other cultural and artistic creations.

Given the sheer volume of library programming appearing on certain of Rainbow's services, to achieve full captioning under present technological constraints in a reasonable and economic manner would be a herculean task. For example, Rainbow created **BRAVO: The Film and Arts Network** in the early 1980's. BRAVO carried the first original productions of symphony, ballet and opera designed expressly for cable television. BRAVO currently reaches more than 25 million cable homes. It features the best of independent U.S. and international film, theater, dance, jazz, and profiles on the arts, such as its new original

^{14/}NCTA at 33.

^{15/}NPRM at ¶ 58.

^{16/}NCTA at 28, Outdoor Life at 26-27; Comments of Direct TV Inc. at 8.

series "Inside the Actors Studio," "Broadway on Bravo," and "Media Television." BRAVO, like Rainbow's news channels, had a long gestation period before becoming profitable. Approximately 20 percent of BRAVO's programming is original productions or co-productions and 80 percent is acquired from other sources.

Rainbow also created **American Movie Classics**, the nation's first 24-hour programming network dedicated to the uncut presentation of classic Hollywood films. AMC is currently available to over 63 million homes. Much like Rainbow's other channels, the bulk of AMC's programming -- approximately 90 percent -- is acquired programming.

Among Rainbow's newer offerings are **The Independent Film Channel** and **Romance Classics**. The Independent Film Channel is a network dedicated to showcasing films made outside of the traditional Hollywood system by today's most visionary filmmakers. Its Advisory Board includes such innovators as Martin Scorsese, Robert Altman, Jodie Foster and Spike Lee. Romance Classics, a first-of-its-kind niche program concept devoted to romance entertainment targeted to women,^{17/} just launched in February 1997, and has 3.5 million subscribers. A substantial portion of both IFC's programming -- approximately 95 percent -- and Romance Classic's programming -- approximately 85 percent -- is acquired.

All of these arts and film programming services rely very heavily on library film and video product. Overbroad closed captioning restrictions on the library programming carried

^{17/}Comments of National Association of Broadcasters ("NAB") at 11 (noting that because new stations have smaller audiences and air the highest percentage of library programming, library programming captioning requirements would place the highest burden on stations least able to pay).

by these Rainbow networks would significantly affect their programming budgets, and impose economic constraints that would inhibit each network's ability to increase its subscriber and programming base.

The FCC properly concluded that Section 713 "was not intended to require captioning of all library programming," noting that its legislative history states that such a goal would be "unrealistic."^{18/} The FCC also notes that the legislative history of Section 713 warns that Congress did not intend "that the required captioning should result in previously produced programming not being aired due to the costs of captions."^{19/} The Commission should refrain from imposing timetables or percentage phase ins on library programming, and allow market forces to dictate the implementation of closed captioning, or the cost of captions will stifle these new programming concepts.

This proposal is overwhelmingly supported by commenters not only from the cable industry, but also from the broadcasting and sports industries and other producers and distributors of video programming. As the comments filed by these diverse interests note, market forces are at work that will dictate the ultimate implementation schedule for the captioning of library programming.^{20/} As new products are created that are closed captioned, the percentage of cable network material not captioned will naturally decline.^{21/}

^{18/}NPRM at ¶ 57.

^{19/}Id.

^{20/}NCTA at 29; Outdoor Life at 26; NAB at 11; Comments of E! Entertainment Television, Inc. at 4.

^{21/}NCTA at 29; Outdoor Life at 26; NAB at 11.

IV. REGIONAL SPORTS PROGRAMMING SHOULD BE EXEMPTED FROM, OR SUBJECTED TO LESS BURDENSOME, CAPTIONING OBLIGATIONS

Numerous broadcast industry commenters including the commercial networks, as well as regional cable sports interests, the NCAA, and the National Association of Collegiate Directors of Athletics, urge the FCC to exempt regional and local sports events, such as those aired on Rainbow's SportsChannels, from the FCC's closed captioning requirements.^{22/} We agree.

SportsChannel New York, launched in 1976, was the first regional cable sports network to provide significant coverage of local sports programming. Rainbow has expanded the SportsChannel concept to include SportsChannel New England, SportsChannel Chicago, SportsChannel Philadelphia, SportsChannel Florida, SportsChannel Ohio, SportsChannel Cincinnati and SportsChannel Pacific. These regional networks carry professional, college, and high school sports of regional interest and other general interest sports programming

As the FCC noted in its 1996 Report on closed captioning: "Cable networks ... differ significantly from broadcast networks in their audience reach."^{23/} None of Rainbow's SportsChannel networks have as substantial a subscriber base as either a broadcast television network or a national cable network. The number of subscribers to these regional sports networks ranges from 1.2 million for SportsChannel Cincinnati to 3.1 million for SportsChannel New York. The market size each serves is limited by the controlling rights

^{22/}NAB at 15; Comments of CBS Inc. ("CBS") at 18.

^{23/}Report, at ¶ 74.

agreements with sports teams, but the cost of captioning is substantially the same that a national broadcast network or cable network would incur.

Unlike other network programming, SportsChannel's programming generally does not have residual value once it is televised. As several other commenters have indicated, sports programming has a short shelf-life, which makes the recoupment of costs through multiple program showings impossible.^{24/} For each program's single showing on a regional sports network, SportsChannel has far fewer subscribers over which to spread the cost of closed captioning than a national broadcast or cable sports network.

Rainbow supports NACDA's observation that sports programming is already significantly captioned due to the live action and graphics included in the program itself.^{25/} The use of graphics in sports programming enables a viewer to experience a game on television in essentially the same way the viewer would experience the event in person.^{26/} The unique nature of sports programming allows the viewer to enjoy the program without the benefit of sound or closed captioning.^{27/}

As several commenters have noted, regional sports networks carry, in addition to major conference Division I football and basketball, second tier sports such as collegiate

^{24/}NAB at 15; See CBS at 19 and Comments of Fox Sports Net, LLC ("Fox") at 10-12 (reiterating that the Commission itself has recognized that unlike feature films which have continuous audience appeal, sports events have substantial entertainment value only at the time of their occurrence).

^{25/}NACDA at 6 ("for instance, many providers are now using a 'bug' in football telecasts, showing, on a running, real-time basis, the score, quarter and time left").

^{26/}NACDA at 4; NAB at 15.

^{27/}NAB at 15; CBS at 21-22; NBC at 5.

gymnastics, swimming, wrestling, soccer, softball, baseball, or volleyball, and other acquired sports and sports information programming, including instructional and highlight shows, where the cost of captioning could actually preclude carriage entirely.^{28/} Rainbow, for example, carries on some regional sports networks, college lacrosse and high school sports championships,^{29/} which in some instances are achieving televised coverage for the very first time.^{30/} These broadcasts are generally viewed by small audiences of specific local or regional interests, and the production costs are often paid by the institutions themselves.^{31/} Because of their limited production budgets, however, significant closed captioning costs could potentially threaten these sports programs from airing at all.^{32/}

^{28/}See NCAA at 7 (observing that a number of NCAA member institutions now have coverage of their women's basketball teams. The revenues for this sports coverage typically exceeds the expenses, and therefore, the benefits of local television coverage may never be realized if exemptions are not granted for this class of programming.).

^{29/}See NACDA at 14 (stressing that these sports are "non-revenue" sports with low viewership and production budgets. In many of these cases Commission imposed regulations, not marketplace conditions, will deny them air-time because the telecasts and cablecasts cannot be economically justified.).

^{30/}Fox at 8; NCAA at 4 (observing that while local college sports telecasts frequently lack large audiences, local television does provide a unique opportunity for the team and its university to reach alumni groups and the community at large).

^{31/}NCAA at 4 (noting that institutions are frequently responsible for production costs that range from \$3,000 to \$18,000, depending on the nature of the contest and size of the staff required).

^{32/}CBS at 18 (noting that the limited size of regional sports networks' audiences and subscriber bases do not create the efficiencies of the national networks that can absorb the costs); see also NACDA at 14 (noting that the application of the closed captioning rules will exacerbate the already increasing problem facing colleges and universities of dropping certain sports due to severe budgetary constraints).

In consideration of these factors, the FCC should resist any efforts to place regional and local sports programming on equal footing with national broadcast and cable sports programming, and exempt regional and local sports from the FCC's closed captioning requirements, or stretch out the timetable considerably for this programming genre.

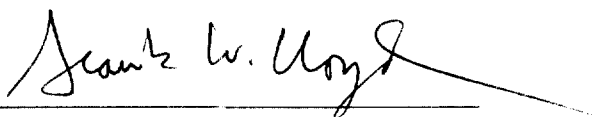
CONCLUSION

Rainbow urges the FCC to avoid the potential unintended consequences to both existing and potential cable programming networks, to cable operators, and to cable consumers of moving too quickly and too comprehensively in requiring closed captioning. The FCC should provide a moratorium of at least five years for captioning on new cable networks. A 10-year phase in for new, non-exempt programming on existing cable networks should be adopted. Library product should not be required to be captioned. Other exemptions or special timetables for services such as regional and local sports and news

should be provided to assure continued innovation in new niche services by programmers such as Rainbow that have brought to cable television the very diversity of services that Congress has sought to promote.

Respectfully submitted,

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